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## Monterey, California



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# THESIS

THE ROLE OF THE NAVY ADMINISTRATIVE  
CONTRACTING OFFICER IN IMPLEMENTING THE  
SUBCONTRACTING PROVISIONS OF PUBLIC LAWS  
99-661 AND 100-180

by

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The Role of the Navy Administrative Contracting Officer  
in Implementing the Subcontracting Provisions of  
Public Laws 99-661 and 100-180

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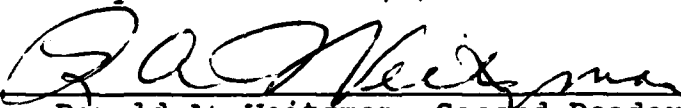
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### ABSTRACT

Public Law 99-661 established a five percent goal for all Department of Defense (DOD) contracts to be awarded to small disadvantaged businesses (SDB's). Public Law 100-180 extended this goal to include large subcontracts under DOD prime contracts. This study was undertaken to assess the role of Navy Administrative Contracting Officers (ACO's) in implementing these laws.

The results of this study indicate: Senior personnel throughout DOD have not fully understood the strong Congressional support this program enjoys. The five percent goal for subcontracting with SDB's is seen as unrealistic by ACO's. The sole source nature of much of the work performed at the activities evaluated limits the actions available to an ACO. There was no statistically significant increase in the level of subcontracting with SDB's between Fiscal Years 1987 and 1988 or between those activities that evaluate ACO's in this area and those that don't.

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## I. INTRODUCTION

### A. BACKGROUND

Section 1207 of Public Law 99-661 established a five percent goal for all Department of Defense (DOD) contracts to be awarded to small disadvantaged businesses (SDB's) in Fiscal Years 1987, 1988 and 1989. Section 806 of Public Law 100-180 extended this goal to all large subcontracts issued by prime contractors. The initial interim rules implementing the laws were published in February of 1987. The final rules, fully implementing this legislation, were published in June 1988, with an effective date of 15 July 1988. [Ref. 1:p. 24]

These laws are the latest in a series of laws designed to increase the share of Government contracts awarded to SDB's. Legislative and Executive Branch efforts in this area began in the 1960's. In fact, Public Laws 99-661 and 100-180 are amendments to key aspects of Public Law 95-507, the major legislation in this area. Congress, still concerned with this program, has further amended these laws and has extended the program for an additional year.

### B. OBJECTIVES OF THE RESEARCH

The objectives of this research effort were: (1) to briefly examine the use of federal procurement as a vehicle of socio-economic programs; (2) to review the events leading



to Public Laws 99-661 and 100-180; (3) to present the provisions and implementation of these laws; and, (4) to assess the impact of these laws at certain Navy activities.

#### C. THE RESEARCH QUESTION

In order to accomplish the objectives of this study, the following research question was pursued:

What actions are being and could be taken by Navy Administrative Contracting Officers (ACO's) to encourage contractors to comply with small disadvantaged business subcontracting plans in accordance with current laws?

The following secondary research questions were germane to this research effort:

1. What is the extent of Congressional concern and action regarding small disadvantaged businesses?
2. Has there been any significant increase in actions taken by Navy ACO's in the last two years to meet the goals of this program?
3. What differences can be identified in the types of action taken by ACO's at various activities?
4. To what extent have actions by the ACO's affected compliance by contractors with their subcontracting plans?

#### D. SCOPE, LIMITATIONS AND ASSUMPTIONS

All Federal agencies and departments must comply with the requirements of Public Law 95-507. Public Laws 99-661 and 100-180 pertain to DOD. This study will discuss DOD's implementation of these laws but will focus on the Navy's administration of them.

More specifically, the study will focus on the role of the ACO in enforcing subcontract plans at two types of activities, Navy Plant Representative Office (NAVPRO) and Supervisor of Shipbuilding, Conversion and Repair (SUPSHIP) activities. These were chosen because contracts administered at these activities offer significant opportunities for subcontracting. Also, the majority of the subcontracts are for manufactured items, as opposed to services. The increased use of small disadvantaged businesses as manufacturers has been a goal of Congress since the inception of these programs.

An SDB is defined as a small business owned and controlled by one or more socially and economically disadvantaged individual(s), as defined within the FAR, with the majority of the earnings accruing to such individuals [Ref. 2:sec. 219.001]. A number of programs exist to assist SDB's. The 8(A) program administered by the Small Business Administration is but one example. This study is particularly directed toward the use of subcontracting to increase the share of Federal contract dollars awarded to this group.

The use of subcontracts to bring these businesses into the Federal acquisition process began in earnest in 1978 with Public Law 95-507. Public Laws 99-661 and 100-180 were only fully implemented within the last year. Policies and procedures are still evolving in this area. Therefore, any conclusions or recommendations are "point-in-time" and could

become outdated as the policies evolve further. It is assumed that the reader of this study is familiar with contract management and the acquisition process within the United States Government.

#### E. RESEARCH METHODOLOGY

The majority of the research for this thesis was done through a comprehensive search of the literature utilizing the Naval Postgraduate School Library, the Department of Administrative Sciences Library, and Defense Logistics Studies Information Exchange (DLSIE). Telephonic interviews with ACO's at NAVPRO and SUPSHIP activities were conducted to assess overall compliance and to gauge command support and results to date in this program.

#### F. ORGANIZATION OF THE STUDY

This thesis studies the role of Navy ACO's in obtaining the five percent subcontracting goal with SDB's mandated by Congress.

Chapter II discusses the background of Public Laws 99-661 and 100-180 by reviewing the use of the Federal acquisition process to affect socio-economic programs. It also reviews the major sections of Public Law 95-507 pertaining to subcontracting.

Chapter III analyzes Public Laws 99-661 and 100-180 and reviews the implementation of these laws.

Chapter IV presents the results of a series of interviews conducted with ACO's at NAVPRO and SUPSHIP activities throughout the United States.

Chapter V analyzes the results of the interviews.

Chapter VI presents the author's observations, conclusions and recommendations concerning this program.

## II. THE BACKGROUND OF PUBLIC LAWS 99-661 AND 100-180

### A. INTRODUCTION

The requirements set forth under P.L. 99-661 and, later, P.L. 100-180 are products of a continuing effort by Congress to implement socio-economic policies via the Federal Government's procurement process. There are now approximately 50 different programs. These programs "represent a multitude of program interests and objectives unrelated to procurement objectives" [Ref. 3:p. 356] and affect virtually every significant government purchase. This process has been summed up by an Office of Federal Procurement Policy (OFPP) administrator as follows:

...history has taught us, we have had and will have continued demands to use federal contracts to serve in social and economic pursuits....While it may be difficult for some to recognize, socio-economic programs now rank as important in the procurement process as the basic business of buying....[Ref. 4:p. 40]

### B. A SYNOPSIS OF SOCIO-ECONOMIC PROGRAMS IN PROCUREMENT

Congress has placed restrictions on defense procurement since the founding of the Republic. In 1792 Congress directed the War Department to purchase six frigates to form the core of the new Navy. Congress further directed that the contracts be let with specified shipyards. The results were as predictable then as they are today. The six shipyards operated independently and purchased the majority of

the needed material from Europe. Delays and overruns caused Congress to cancel three of the contracts. [Ref. 5:p. 15] Strictly speaking, this was not a socio-economic program, though it portended the level of control that Congress would come to exercise over defense procurement.

The Naval Service Appropriation Act of 1865 and the Army Appropriation Act of 1867 are early examples of the use of the federal acquisition program to implement socio-economic policies. These Acts "mandated the purchase of only American bunting and preferred American labor and materials for public improvement contracts." [Ref. 6:p. 41] Other early laws governing federal contracts dealt with labor issues.

The eight hour work day was extended to contractors and their subcontractors in 1892 under the Eight Hours Laws. An 1897 statute prohibiting the hiring-out of convict labor was expanded by an executive order signed by President Roosevelt in 1905 to prohibit the use of convict labor on government contracts. [Ref. 7:p. 112]

The depression of the 1930's prompted Congress to pass several major pieces of legislation impacting upon the federal procurement process. Several of these are still in effect. Congress passed the Buy American Act which sought to protect American industry and promote jobs. Various labor standards provisions, including the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, and the Copeland

"Anti-Kickback" Act were also enacted. These laws were designed to prevent exploitation of workers by their employers. Two other significant pieces of legislation from this era include "the Federal Prison Industries Act and the Wagner-O'Day Act which established preferences for products produced by federal prisoners and by the blind." [Ref. 6:p. 42]

The need to effectively utilize all the nation's resources during World War II resulted in executive orders requiring nondiscrimination in employment by government contractors. Similarly, Korean War requirements led to the program in 1952 for placing government contracts in labor surplus areas. Recent programs have been concerned with providing business opportunities for minorities and women. [Ref. 6:p. 42]

C. DEVELOPMENTS WITHIN THE SMALL BUSINESS PROGRAM  
PROMOTING THE USE OF SMALL DISADVANTAGED BUSINESS IN  
SUBCONTRACTING

Congressional actions regarding the use of the federal procurement process to promote small businesses deserves special attention here for several reasons. First, the small business programs have been described as "the most pervasive and the most visible to procurement personnel" [Ref. 3:p. 376] of the many socio-economic programs. The second reason is that the history of the program illustrates how Congress has adjusted the goals of the program to meet the changing agenda of American society. Finally, this

thesis addresses one portion of this program. Therefore the discussion that follows will focus on one aspect of this broad program, namely the use of subcontracting opportunities afforded small disadvantaged businesses within the federal procurement process.

The Small Business Act can be traced to the Reconstruction Finance Corporation, created in 1932 to aid large and small businesses. This particular law failed to meet judicial scrutiny. Still, this "program established the idea of aid to business" [Ref. 3:p. 377] as a proper government function.

Public Law 77-603, passed in 1942, was the first law dealing specifically with small businesses. This law created the Smaller War Plants Corporation (SWPC). Many of today's programs were developed by this agency.

One of its primary functions was to assist the small businessman in securing government prime contracts and subcontracts. It also established and maintained an inventory of small business production facilities. This inventory was used by government buying agencies and prime contractors in locating small business sources for products they needed. Under this authority, the buying agency could contract with the SWPC for a required item; the SWPC could then award a subcontract for performance of the work to a small business....Finally, when the small business needed financial assistance, the SWPC was able to make loans. [Ref. 3:p. 377]

The SWPC awarded over 58,000 prime contracts and 52,000 subcontracts to small businesses during the three year period ending in November of 1945. These contracts were worth over five billion dollars. The SWPC was abolished by executive order at the end of World War II. Responsibility



for prime contract assistance was transferred to the Reconstruction Finance Corporation, and other duties were transferred to the Office of Small Business within the Department of Commerce. [Ref. 3:p. 378]

The Korean War served as an impetus to reestablish a specific agency to assist small business. As an amendment to the Defense Production Act of 1950, the Small Defense Plants Administration (SDPA) was established to assist small businesses obtain government contracts. The SDPA had many of the same duties as its predecessor, the SWPC. In addition, the SDPA was provided the responsibility of certifying that a small business was capable of performing a contract. This was accomplished by issuing a Certificate of Competency (COC) to the government buying agency. The issuance of a COC prevented a contracting officer from declaring a small firm to be nonresponsible. It did not require the contracting officer to utilize that firm and the SDPA had no authority to implement its recommendation. This reduced the effectiveness of the SDPA in carrying out its mission. [Ref. 3:p. 379]

By 1953, the Korean War was winding down. This meant that there was less of a need for defense goods. Still, Congress realized that a need still existed for an agency to promote the use of small business by the Federal government. The Small Business Act was passed on July 30, 1953, creating the Small Business Administration (SBA). The SBA assumed

the functions of the SDPA and the Federal Reconstruction Corporation which were abolished by the same law. [Ref. 3:p. 380]

A 1958 amendment to the Small Business Act increased the responsibilities of the SBA. It also established the SBA as a "permanent agency and clearly recognized independent small businesses as a distinct and vital element of the national economy." [Ref. 3:p. 380] An additional 1961 amendment required major government contractors to establish small business subcontracting programs.

Congress also enacted the Small Business Investment Act in 1958 authorizing the SBA to license a class of investment companies who, in turn, would provide capital to small business concerns. This act was amended in 1972 to allow the licensing of small business companies who would have as their sole policy, "investments in small business owned by individuals who are hampered because of social or economic disadvantage." [Ref 6:p. 44]

The laws were supplemented by Executive Order 11458 in 1969, issued by President Nixon in response to the 1967 Report of Civil Disorders. It prescribed national efforts for developing and coordinating a national Minority Business Enterprise (MBE) program to provide opportunities for minority-owned firms to compete for private and government contracts. This led to the establishment of the Office of

Minority Business Opportunity in the Department of Commerce.

[Ref. 8:p. 2]

This Executive Order was superceded by Executive Order 11625 in October of 1971. Executive Order 11625 stated that it is in the national interest to have full participation in the free enterprise system and that all Federal departments and agencies were to "increase their efforts in fostering and promoting minority business enterprise." [Ref. 8:p. 2] Many of the provisions found in subsequent legislation have their foundations in this Order. The Secretary of Commerce was directed, with the participation of other Federal departments and agencies as appropriate, to:

Develop comprehensive plans and specific program goals for the minority enterprise program; establish regular performance and monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of Federal support in achieving the objectives established by this order. [Ref. 9:sec. 1(b)1]

The Office of the Assistant Secretary of Defense (Installations and Logistics) established DOD's responsibilities for increasing utilization of MBE's. A Directorate for Small Business and Economic Utilization Policy was established to advise ASD (I&L) "in matters relating to establishing, implementing, and executing the MBE Subcontracting Program." [Ref. 8:p. 2] The Armed Services Procurement Regulations (ASPR) was amended to provide maximum opportunity for MBE's to participate in government contracts and to require prime contractors to increase the use of MBE's as subcontractors. [Ref. 8:p. 2]

A 1977 GAO report called for improved DOD guidance and directions for implementing the MBE Subcontracting Program by amending the Armed Services Procurement Regulations (ASPR) requirements concerning the use of MBE subcontractors by primes. It also stated the need for DOD to contractually require contractors to develop goals for the identification and solicitation of minority firms capable of providing required products and services. Finally, the report cited the need to develop standards to measure contractor performance under this program and for adequate criteria for determining "which prime contractors should participate in the MBE Subcontracting Program." [Ref. 8:p. 19]

Some studies cited the lack of a legislative basis for subcontracting with MBE's as one of the causes for the lack of success of this program. [Ref. 10:p. 14] Efforts to rectify this situation led to the passage of H.R. 11318 by the House of Representatives on March 29, 1978, amending the Small Business Act. The Senate's version of the bill, S. 2259, passed the Senate on September 15, 1978. A Senate-House conference resolved the differences between the two bodies and sent the bill to the President for signature. The legislation, signed by President Carter on October 24, 1978, became Public Law 95-507.

#### D. PUBLIC LAW 95-507

Section 202 of this law provided a statutory basis for the 8(a) program. In doing so, it strengthened the powers

of the Small Business Administration. For example, earlier it was noted that a contracting officer could ignore the SBA's request that a particular contract be set aside for the 8(a) program. Under Public Law 95-507, the contracting officer's refusal could be appealed to the Secretary or other head of the agency or department involved. [Ref. 6:p. 55] Other provisions addressed problems that had impeded the ability of MBE's to obtain a significant percent of government contracts. [Ref. 11:p. 4] "Probably the most important section of the new law" [Ref. 6:p. 49] was Section 211 which amended Section 8(d) of the Small Business Act. Under this section of the law, all contracts let by any Federal agency in excess of \$10,000 that will be performed within the U.S.A. or its territories and are not for a personal service must contain a clause that reads, in part:

It is the policy of the United States that small businesses and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency. The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract.... [Ref. 12:sec. 211]

Section 211 required that the apparent successful offer- or or the apparent low bidder on Federal contracts for more than \$500,000 (\$1,000,000 for construction) submit, prior to the award of a contract, a subcontracting plan. The plan had to contain the following information:

1. Percentage goals for the utilization of small businesses and small disadvantaged businesses;

2. The name of an individual employed by the contractor who would administer this program as well as a description of this person's duty;
3. A description of the efforts the contractor would take to ensure that these entities would have an equitable opportunity to compete for the subcontracts;
4. A commitment to impose these same requirements on large subcontractors (same dollar thresholds as for the prime contractor);
5. Assurances that the contractor would submit periodic reports and cooperate in studies and surveys required by Federal agencies in order to determine the level of compliance by the contractor with the plan;
6. A recitation of the types of records that a contractor would maintain to demonstrate compliance with the requirements and goals set forth in the plan.

Small businesses were exempt from this law. The failure of any contractor or subcontractor to comply in good faith with the clause or any plan submitted under it was deemed to be a material breach of the contract.

Section 211 also authorized, for negotiated procurements, appropriate incentives to prime contractors to encourage subcontracting opportunities to small and small disadvantaged firms, commensurate with the efficient performance of the contract. These provisions allowed an additional payment, up to ten percent of the dollar value of subcontract awards in excess of the five percent goal. Payment of this incentive was at the discretion of the contracting officer. Appeals from the contracting officer's opinion were not allowed. [Ref. 12:p. 72]

DOD was slow in responding to this clear message from Congress to increase the use of SDB's in the procurement

process, especially at the subcontractor level. DAC 76-19, implementing Section 211, wasn't published until October 1979. Federal government officials were severely reprimanded during hearings held by the Subcommittee on General Oversight and Minority Enterprise of the House during December of 1979 by Rep. John LaFalce, the panel's chairman, and other members of the panel. Rep. Parren J. Mitchell (D-MD) stated that:

Some evidence strongly infers a flagrant lack of compliance with Public Law 95-507. I must remind these agencies' representatives that they are neither judge nor jury. This law is the law of the land and is to be implemented as written, not as some agency employees think it should be. I am in the vanguard calling for the removal of those recalcitrant agency employees who fail to implement Public Law 95-507. [Ref. 13:p. 29]

Several reasons have been cited for the slow implementation of the law. Perhaps the major factor was the lack of coordination between the drafters and the procuring agencies prior to enactment of the law. A second major factor was that this law represented a major shift in the role of the contracting officer. The role had been a passive one in which contractors were encouraged to subcontract with certain types of firms. Under the new law, the contracting officer was required to approve the subcontracting plan and enforce its implementation. Added to this was industry's overwhelming opposition to the new law and a certain amount of foot dragging by DOD. [Ref. 6:p. 95]

In 1988, Rep. LaFalce again took DOD to task for failing to adequately implement Public Law 95-507. A May 1988 GAO

report [Ref. 14] stating that 100 of 216 contracts awarded by Naval Air Systems Command (NAVAIR) failed to contain subcontracting plans required by this law prompted an appearance before the House Small Business Committee by NAVAIR's commander, Vice Admiral Wilkinson. The Navy was able to justify not including the plan in 48 of the 100 contracts noted by GAO, prompting Rep. LaFalce to inquire "why after ten years of implementation, the GAO found 52 out of 100 NAVAIR contracts" [Ref. 15:p. 106] lack subcontracting plans? Adm. Wilkinson pointed out that the subcontracting plan was included in 27 of these contracts. Adm. Wilkinson attributed the lack of a subcontracting plan in the remaining contracts to NAVAIR contracting officers inadvertently failing to update existing plans after contract modifications were issued. [Ref. 15:p. 106] In other words, none of the 100 contracts alleged to be missing subcontracting plans were actually missing them. Admittedly, procedures were tightened up at NAVAIR to ensure that modifications to contracts met the requirements of the law. This is a far cry from the allegation, however, that nearly half the contracts issued lacked a basic clause required under a ten year old law.

There are a number of possible interpretations of the above situation. One of these is that Congress is not interested in the progress DOD is making in this area, but rather, is overly concerned with finding flaws in the



implementation of this law. A second interpretation of this encounter is that DOD officials still do not comprehend the importance Congress attaches to this program. In fact, that was the situation according to a source within the Office of the Secretary of Defense. Furthermore, DOD was afforded an opportunity to comment on the study with GAO prior to the submission of the report but declined to do so other than to provide oral comments and concur with GAO's observations. [Ref. 14:p. 3] As a result, NAVAIR found itself defending its actions to Congress instead of being able to promote its achievements under this program.

Many would argue that it was the perception by Congress that DOD wasn't interested in promoting this program, coupled with minimal results under this program, that prompted the portions of Public Laws 99-661 and 100-180 dealing with small disadvantaged business subcontracting.

#### E. SUMMARY

Chapter II has provided the reader with an appreciation of the increasing use of the Federal government procurement process to promote socio-economic programs. The small business program has evolved over a 40 year period into a broad program with a multitude of facets. One of these, the use of SDB's as subcontractors, has gained widespread support in Congress. The first law dealing specifically with this program, Public Law 95-507, was passed in 1978. The failure by DOD to make sufficient progress under this

law has resulted in the passage of two additional laws dealing with this program, Public Law 99-661 and Public Law 100-180.

Chapter III will discuss the provisions of these laws that deal with the use of SDB's as subcontractors. It will also review the implementation of these laws to date.

### III. PUBLIC LAWS 99-661 AND 100-180

#### A. INTRODUCTION

Two facts must be recognized in discussing Public Laws 99-661 and 100-180 as they relate to subcontracting with SDB's. First, Public Law 99-661, the 1987 Defense Authorization Act and Public Law 100-180, the 1988 Defense Authorization Act address a multitude of issues. Second, they amplify, rather than replace, Public Law 95-507. As stated in a Small Business Administration guide designed for use by SDB's interested in contracting with the government, "The new legislation...does not replace previous initiatives, but rather builds on the foundation they create." [Ref. 16:p. 1-4] Consequently, discussions of these laws will be confined to those sections that pertain to subcontracting with SDB's.

#### B. PROVISIONS OF PUBLIC LAWS 99-661 AND 100-180

Section 1207(a) of Public Law 99-661 states that:

Except as provided in subsection (d), a goal of five percent of the amount described in subsection (b) shall be the objective of the Department of Defense in each of fiscal years 1987, 1988, and 1989 for the total combined amount obligated for contracts and subcontracts entered into with:

- (1) small business concerns, including mass media, owned and controlled by socially and economically disadvantaged individuals....
- (2) historically Black colleges or universities; or
- (3) minority institutions.

Subsection (b) of 1207 gives a broad scope to the five percent goal by including funds obligated for procurement; research, development, test, and evaluation; military construction; and operation and maintenance.

Under subsection (d), the five percent goal does not apply:

- (1) to the extent to which the Secretary of Defense determines that compelling national security considerations require otherwise; and
- (2) if the Secretary making such a determination notifies Congress of such determination and the reasons for such determination.

The Secretary of Defense is directed to exercise his utmost authority, resourcefulness, and diligence to meet the five percent goal. This includes providing technical assistance to potential contractors. This assistance is to include information about the program, advice about DOD procurement procedures, instruction in preparation of proposals and other assistance the Secretary considers appropriate.

Congress's dissatisfaction with DOD's implementation of section 1207 led to the inclusion of Section 806 in Public Law 100-180 which was titled "Requirements for Substantial Progress on Minority and Small Business Contract Awards." As stated in Subsection (a):

The Secretary of Defense shall ensure that substantial progress is made in increasing awards of Department of Defense contracts to section 1207(a) entities.

In subsection (b), Congress has specifically directed the Secretary to carry out the requirement of subsection (a)

through the issuance of regulations governing a number of actions. Under this section, contracting officers are required to:

(A) set goals which Department of Defense prime contractors that are required to submit subcontracting plans...in furtherance of the Department's program to meet the 5 percent goal established under Section 1207...should meet in awarding subcontracts...to section 1207(a) entities; and

(B) provide incentives for such prime contractors to increase subcontractor awards to 1207(a) entities.

Congress has levied the requirement that contracting officers emphasize the award of contracts to section 1207(a) entities in all industry categories, including those in which 1207(a) entities have not traditionally dominated. Several other provisions deal with the relationship between Small Business 8(a) set-asides, and steps taken to increase the use of small disadvantaged business as subcontractors. Specifically, Section 806(b)(8) of the Act calls for:

...implementation of Section 1207 of the National Defense Act for Fiscal Year 1987 in a manner which will not alter the procurement process under the program established under section 8(a) of the Small Business Program.

Finally, under this Act, Congress has mandated that one factor used in evaluating the performance of contracting officers be the ability of the officer to increase contract awards to section 1207(a) entities.

#### C. IMPLEMENTATION OF PUBLIC LAWS 99-661 AND 100-180

Implementation of these laws has been lengthy, especially given the relatively minor changes these laws impose. Public Law 99-661 was signed by the President on November

14, 1986. The final regulations implementing the laws appeared in the Federal Register on June 6, 1988 with an effective date of July 15, 1988. Defense Acquisition Circular (DAC) 86-15, dated July 1, 1988, effected the changes to the Defense Federal Acquisition Regulation Supplement (DFARS) required to implement this law.

The major cause of the delay in publishing the final regulations was the passage of Public Law 100-180 on December 4, 1987. A contributing factor was the large number of public comments concerning these laws.

This is not to imply that the laws were not at least partially implemented during the nearly two-year period from November 1986 through July 1988. Secretary of Defense Frank Carlucci, in an interview discussing the implementation of these laws, asserted that "the program was fully implemented throughout DOD on June 1, 1987." [Ref. 17:p. 19] As will be discussed below, however, there were two sets of interim rules published in addition to the final rules. The evolving rules drastically altered the interpretation of certain provisions leading to a great deal of uncertainty as to the correct interpretation on those clauses. Furthermore, this has resulted in different rules governing proposals depending on the date of the solicitation for the contract. This reduced the impact of these laws for the first two years after their passage.

As a partial implementation of Public Law 99-661, DOD issued an interim rule and a request for comment in the Federal Register on May 4, 1987. Over 600 public comments were received in response to the proposed rules. While those comments were being reviewed and rule changes drafted, Section 806 of Public Law 100-180 was enacted. This law established procedures and guidelines which required significant changes to the rules published in May of 1987.

On February 19, 1988 a second set of rules was published in the Federal Register. These rules reflected the changes in the law that were the result of the December 1988 legislation and incorporated many of the changes suggested by comments received in response to the earlier publication. Over 80 written comments were received to the interim rule published in February of 1988. These comments were incorporated into the final rules published on June 6, 1988.

The Defense Acquisition Regulatory Council (DARC) received nearly 700 written comments from contractors and other DOD components in response to the two requests for public comment. Approximately 130 issues (or regulatory alternatives) were identified as the result of the comments, falling generally within 27 broad topical areas. Public comments on several of the topics, and the DARC response, contained in the Final Regulatory Flexibility Analysis (FRFA) are germane to this research as they represent the reasoning behind the final regulations. A review of the

comments also indicates that some of the provisions were misunderstood by contractors.

As an example, one respondent claimed that by mandating a five percent goal, and going beyond a good faith requirement, DOD was exposing itself to legal problems if a default could be attributed to a small disadvantage business selected against the contractor's judgment at DOD's insistence. The DARC response emphasizes that a five percent requirement has not been imposed on individual contracts, nor has the Federal Acquisition Regulation (FAR) been revised to establish more than a good faith effort. Congress has imposed an overall goal of five percent for all of DOD's procurement. The requirement in Public Law 100-180 that regulations be implemented to encourage attainment of the five percent goal has resulted in the new requirement found in Section 19.705-4 of the DFARS. This Section states that "any SDB goal of less than five percent of the total planned subcontracting dollars must be approved two levels above the contracting officer." In the words of the DARC:

This new review requirement is intended to ensure proper consideration and to escalate challenges to "soft" plans/goals within the Government and prime contract management. [Ref. 18:p. 2-1]

Another common response to the proposed regulations has been that the five percent goal be established on a company-wide basis, rather than on a contract-by-contract basis. The DARC response is that traditionally, this requirement



has been interpreted to be at the individual contract level and not at the company level. The DARC further noted that:

...given the difficulty of establishing responsibility, and tracking and enforcing subcontract performance at the individual contract level, it is arguable that a company-wide approach would negate the concept of an "incentive" for SDB subcontracting performance. [Ref. 18:p. 2-3]

There are three exceptions to the requirement for developing a subcontracting plan for each contract in excess of \$500,000. Contracts for commercial products are exempt from this requirement. These contracts are negotiated on a company-wide basis by the first agency awarding a contract over \$500,000 and cover the entire fiscal year. Imposing a contract-by-contract reporting requirement would not be practical and would require establishment of reporting requirements not currently required in order to segregate subcontracts under DOD contracts from subcontracts under other Federal agencies. [Ref. 18:p. 2-8] The second exception to the required subcontracting plan is for a contract with a small business. Section 211(d)(7) of Public Law 95-507 exempted small businesses from this requirement and neither of the two later laws changed this. The final exception, found in DFARS, Section 219.702-7, is for a contract that does not have any subcontracting possibilities.

#### D. ADDITIONAL LEGISLATION EXTENDING PUBLIC LAW 100-180

Congress has passed two laws subsequent to Public Law 100-180 that expands the SDB program. The first, Section

844 of Public Law 100-456, extended this program through Fiscal Year 1990.

The second law, Public Law 100-661, was signed into law in November 1988. Section 304 provides for a contracting officer to assess liquidated damages upon a finding that a prime contractor has failed to make a good faith effort to comply with a subcontracting plan.

This law appears to back off from the strict five percent subcontracting requirement imposed by Public Law 100-180. This is based upon the wording of the law that states that the goals for this plan must be attainable in relation to the pool of eligible subcontractors available to fulfill the subcontracting opportunities and the actual past performance of the prime contractor on previous contracts. [Ref. 19:p. 640] The regulations implementing this legislation have not been drafted, however, so it is not possible to determine the ultimate impact this law will have on the SDB program.

#### E. RECENT PROPOSED CHANGES TO THE FAR

In yet another recent development in this area, DOD presented a wide-ranging plan to Congress designed to increase awards to SDB's. The plan, unveiled in October 1988, allows for larger incentives and higher progress payments to those contractors that exceed their subcontracting plan. It also reduces profits to those contractors who fail to meet their subcontracting goals. Finally, it specifically recognizes

the inordinate expense in qualifying these companies as subcontractors and makes the primes' costs of assisting SDB's allowable under the FAR. [Ref. 20:p. 676]

Recognizing the difficulty in meeting the five percent goal established by Congress, the plan would utilize lower goals, tailored to specific industries. A contractor who meets the goal for a given year would be eligible for increased progress payment rates during the following year. A contractor exceeding the goal by at least 50 percent would be eligible for a two percent increase in progress payments. Those contractors who fail to meet their goals would have their progress payment rates reduced by a similar amount in the following year. [Ref. 20:p. 677]

The plan revises the incentive clause by basing it on the agreed upon, and possibly lower, goal vice the currently mandated five percent goal. Under this plan, a contractor could receive ten percent of the difference between the goal, perhaps three percent, and the amount actually awarded, say four percent. Under the current system, a contractor would not receive any incentive fee if the amount of subcontracts awarded to small disadvantaged firms is under five percent. Implicit in this plan is the reduction in the role of the SF 294, the Subcontracting Report for Individual Contracts, in favor of the SF 295, Summary Contract Reporting, as companies would be rewarded on a company-wide basis. Finally, the plan broadens the basis for

awarding the fee to all efforts expended by the contractor in this area. In addition to subcontracts awarded SDB's, the plan would reward any technical assistance and effort to qualify these firms. The award pool would be spelled out in the contract. [Ref. 20:p. 677]

The changes have not been effected to the DFARS. Therefore, it is too early to assess the final outcome they will have on this program.

#### F. SUMMARY

This chapter has provided the reader with information concerning various provisions of Public Laws 99-661 and 100-180. Because both of these are concerned with a wide variety of topics, the discussion was limited to those sections concerned with subcontracting with SDB's. The provisions of the laws, as well as their implementation, was explored. Selected provisions of the Final Regulatory Flexibility Analysis, prepared by the DAR Council, were reviewed to provide insight into the rationale behind some of the more controversial regulations adopted to implement this legislation.

The remainder of this study will examine the results of interviews conducted with Administrative Contracting Officers to assess the implementation of these laws.

Chapter IV will review the responses to the interviews. Chapter V will analyze the responses. Chapter VI will present conclusions and recommendations.

#### IV. SURVEY QUESTIONNAIRE AND RESULTS

##### A. INTRODUCTION

The data presented in this study were accumulated through telephone interviews with 25 Administrative Contracting Officers (ACO) at Navy Plant Representative Offices (NAVPRO) and Superintendent of Ship (SUPSHIP) activities throughout the continental United States from November 1988 through January 1989. A complete listing of activities contacted is included in Appendix A. The organizations surveyed represent all of the NAVPRO's and 12 of the 15 SUPSHIP's listed in DOD Instruction 4105.59-H, DOD Contracting Activities [Ref. 21].

The questionnaire used to conduct the interviews was designed to evaluate several aspects of contract administration. First, it examined compliance with the regulations implementing Public Laws 99-661 and 100-180. Second, it assessed the impact of this law on the use of SDB's as subcontractors. Third, it measured the level of command support for this program. Finally, it used open-ended questions to ascertain actions an ACO took when a contractor failed to meet the requirements of a subcontracting plan. It also asked ACO's to identify impediments to further progress under this law as well as suggestions to improve

this program. The analysis will be performed by reviewing questions based on the categories described above.

At each activity, the researcher contacted the Director or Deputy Director of contracting. After explaining the purpose of the study, the researcher requested the name of an ACO, knowledgeable with the administration of the Command's small disadvantaged business subcontracting program. The interview was then conducted with the individual so designated by the Command. Each interview lasted approximately 30 minutes.

## B. SURVEY QUESTIONS AND RESULTS

### 1. Question One

Is contracting with Small Disadvantaged Businesses a part of your training program?

Requirement: There is no requirement for this to be in an ACO's training program.

Responses: All the ACO's contacted had received some training concerning subcontracting with small disadvantaged businesses through SBA seminars or in classes offered by DOD. Most of the respondents indicated that they attended the seminars in their capacity as a small business specialist and that the other ACO's rarely received this information. Virtually none of the commands, however, offered this training as part of the command's training program. One NAVPRO and one SUPSHIP included this topic in their local training program.

2. Question Two

If so, are 1207 requirements included? When was the training last updated? How often is it given?

Requirement: There is no requirement for this to be in an ACO's training program.

Responses: As indicated in Question One, only two of the activities contacted conduct training for their ACO's on this topic. At one of these activities, the training had been given about six months earlier, and is given on an annual basis. The other activity gives the training on an "as needed" basis. All of the ACO's interviewed were aware of the recent changes in this program due to training received through other sources.

3. Question Three

Is there a Command Instruction concerned with subcontracting goals?

Requirement: There is no requirement for one. The presence of one, however, would indicate command support for this program and would promote awareness throughout the command of this program.

Responses: One NAVPRO and two SUPSHIP's have Command Instructions concerning subcontract goals.

4. Question Four

How does your command track contractor compliance with subcontracting requirements?

Requirement: The contractor is required to submit an SF 294, Subcontracting Report for Individual Contracts, and an SF 295, Summary Contract Report to the ACO. These reports, along with other pertinent information, are used to evaluate the contractor's compliance with the contract. [Ref. 2:sec. 19.706]

Responses: Seven of the NAVPRO's rely exclusively on the SF 294/295 to monitor compliance with this requirement. The other six utilize detailed analysis of the contractor's procurement records, usually performed on a semi-annual basis, to evaluate compliance. Three of the SUPSHIP's go beyond a review of the SF 294/295 to assess contractor compliance. The remaining eight depend upon these reports to assess contractor compliance.

5. Question Five

Who receives the SF 295/295?

Requirement: The Contract Administration Office is responsible for reviewing, evaluating, and approving subcontracting plans. In evaluating these plans, the Small Disadvantaged Business Specialist "shall support the ACO in evaluating a contractor's performance and compliance with the subcontracting plan." [Ref. 2:sec. 19.706]

Responses: At the NAVPRO's, the SADBUS receives the forms in six cases, the Deputy Director for Small Business receives the forms in five cases, and the ACO in one case. The results are similar for SUPSHIP's. At these activities,



the SADBUS receives the forms at three of the activities, the Deputy Director for Small Business receives the form at four activities, the ACO or a Procurement Analyst receives this information at two activities. One SUPSHIP doesn't receive this information at all, but rather has it forwarded directly to NAVSEA. At another SUPSHIP, these reports are received by a Procurement Analyst who works for the PCO.

6. Question Six

Who reviews the SF 294/295?

Requirement: See Question Five.

Responses: The information is reviewed by the same person who receives it at all the NAVPRO's. The same is true for all the SUPSHIP's except for one. At this particular activity, the ACO receives this information and passes it to the SADBUS for review. Also, at another SUPSHIP, the ACO reviews the information jointly with the SADBUS.

7. Question Seven

What do you do with the information contained in the SF 294/295?

Requirement: See Question Five.

Responses: The NAVPRO's place nominal importance on these reports. This is especially true of those NAVPRO's that perform extensive review of the contractors' compliance with this requirement. Four of the six NAVPRO's that perform an in-depth review of the contractor's procurement system stated that they collect the SF 294 only because of

the FAR requirement that they do so. This was because they felt that the reports, particularly the early ones, are not indicative of contractor compliance with the subcontracting plan. Of the seven NAVPRO's that rely extensively on these reports to assess the contractor, three of the ACO's said they don't review the information in great detail. Only four of the SUPSHIP's actually review these reports. The other activities collect the data and forward copies to NAVSEA. Of the four SUPSHIP's that actually review these reports, only two do so in any detail.

8. Question Eight

How do you define "good faith compliance" with the Plan?

Requirement: This is defined as an abstract and intangible quality with no technical meaning or statutory definition. In ordinary usage this term is used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud and, in general, being faithful to one's duty or obligation. As applied to commercial law, it means honesty in fact in the conduct or transaction concerned. [Ref. 22:p. 430]

Responses: There was a great deal of diversity on this answer. Four NAVPRO's said that they look for basic compliance with the plan, actually comparing the percent of the subcontracting dollars awarded to that which the contractor set as the goal. Three others said that compliance

with the actions called for in the subcontracting plan constituted good faith compliance, regardless of the outcome. The rest of the NAVPRO's looked beyond compliance in defining good faith compliance. One activity said that the level of training given buyers was a major consideration. Another NAVPRO concentrated on the development and use of source lists of SDB's to use as subcontractors while another NAVPRO looked to the willingness of the prime to use new vendors. The SUPSHIP responses were similar to the NAVPRO's except that four of the SUPSHIP's said that the contractor was in good faith compliance with the contract if a review of the prime's purchasing system indicated that small disadvantaged businesses were fairly evaluated in competition for subcontracts.

9. Question Nine

After you review a SF 294/295, how do you obtain amplifying information concerning lack of "good faith compliance"/progress by the contractor towards meeting requirements of the Plan?

Requirement: There is no specific course of action required.

Responses: One NAVPRO stated that this situation had never developed. Another NAVPRO said that insufficient progress in this area resulted in a formal letter being sent to the contractor requesting information explaining the lack of progress in this area. The rest of the NAVPRO's said

that, if the review of the SF 294/295 indicated insufficient progress in this area, they informally contact the contractor and request this information. Most of the ACO's said that they would request documentation to show that sufficient effort was being made to subcontract with small disadvantaged businesses. The SUPSHIP's responses were virtually identical to the above. One activity said this had never been a problem, one said a formal letter was used, and the rest informally contacted the contractor involved.

10. Question Ten

Does a lack of "good faith compliance" in meeting requirements contained in a contract result in any action by your activity?

Requirement: The ACO is responsible for monitoring contractor compliance with the subcontracting requirement of the contract and for providing the contracting officer information concerning compliance. The ACO is required to notify the contracting officer "if, during performance, the contractor is failing to meet its commitments under the... subcontracting plan." [Ref. 23:sec. 19.706(a)(5)]

Responses: Only two NAVPRO's indicated that any action would result from the lack of a good faith compliance by a contractor. Seven of the SUPSHIP's said that this would result in further action.

11. Question Eleven

If so, what action results?

Requirement: See Question Ten.

Responses: Both NAVPRO ACO's that answered in the affirmative to Question Ten said that they would increase the level of surveillance of the contractor, including an independent survey of vendors to ensure that SDB's were being contacted in sufficient numbers. The SUPSHIP ACO's took a variety of actions in this situation. One notified the Small Business Office at NAVSEA. Another ACO used this information to reduce profit under the Weighted Guidelines by reducing the evaluation of the contractor in the "Management" section. Three of the ACO's wrote formal letters to the contractor requiring an explanation of the low performance. Two ACO's documented the files for use in evaluating future proposals by the contractor.

12. Question Twelve

The following question is asked hypothetically only. Given the lack of a "good faith effort" by a contractor in meeting the requirements of his Plan, would you consider taking any of the following steps:

- a. Recommend stopping/reducing progress payments.

Requirement: An ACO may disapprove Progress Payments if the contractor is not in compliance with all material requirements of the contract. [Ref. 23:sec. 32.503-6(b)] Failure to comply in good faith with the requirements of the Plan is a material breach of the contract. [Ref. 23:sec. 19.702c)]

Responses: Eight of the NAVPRO, and four of the SUPSHIP ACO's said this would be appropriate.

b. Do you feel that the use of a liquidated damages clause specifying the level of damages that would be applied if a contractor did not meet his goal would be appropriate?

Requirement: As noted previously, Section 304 of the recently enacted Public Law 100-556 states that any contract requiring a subcontracting plan shall contain a clause for the payment of liquidated damages upon a finding that a contractor has failed to make a good faith compliance with this requirement.

Responses: Five of the NAVPRO and two of the SUPSHIP ACO's answered "Yes." Additionally, one other NAVPRO ACO agreed this would be appropriate if the goal could be negotiated at a level agreeable to both parties instead of the five percent goal routinely imposed on the contractor.

c. Recommend termination for default.

Requirement: Any contractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. [Ref. 23:sec. 19.702(c)] If an ACO determines that a contractor is not complying with this requirement, "action to initiate default proceedings is appropriate." [Ref. 18:p. 2-11]

Responses: Only two of the NAVPRO ACO's and one of the SUPSHIP ACO's said this was even hypothetically

appropriate. All the other ACO's said that the sole source nature of the work being performed at their activity precluded this action.

d. Based on noncompliance of a contractor with previous Plans, would you recommend against the use of that contractor in a subsequent contract?

Requirement: If the contractor does not comply in good faith with the subcontracting plan, the ACO shall, upon contract completion, make appropriate recommendations that contracting officers may use for future contracts. [Ref. 23:sec. 19.706(b)]

Responses: Eight of the NAVPRO and seven of the SUPSHIP ACO's said this was appropriate, but virtually all of the ACO's said that sole source considerations made this a moot point.

13. Question Thirteen

Have you ever taken such actions due to noncompliance by the contractor for this portion of his contract?

Requirement: There is no requirement to take any of the actions discussed in Question Twelve.

Responses: None of the ACO's contacted had ever taken any of the actions outlined in Question Twelve.

14. Question Fourteen

Do prospective PCO's request information concerning past performance of a contractor in meeting SDB goals in similar, previous contracts?

Requirement: In making an award, the contracting officer shall consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility. [Ref. 23: sec. 19.705(5)(a)(1)] One of the duties of the ACO is to support the PCO by providing documentation on the contractor's performance and compliance under previous plans. [Ref. 23:sec. 19.706(a)(1)]

Responses: Five of the NAVPRO ACO's and one SUPSHIP ACO answered "Yes." The overwhelming consensus in this area is that a PCO is interested in having a subcontracting plan included in the documentation, but isn't concerned with the contents of the plan.

15. Question Fifteen

On a scale of 1-10, with 1 being low, how much emphasis does your command place on compliance with Small Disadvantaged Business subcontract plans, relative to other contract provisions?

Requirement: There is no requirement to place greater emphasis on this program than other contractual provisions.

Responses: Table 1 shows the responses to this question.

16. Question Sixteen

Are you evaluated on your efforts to obtain contractor compliance in this area?



TABLE 1  
ACO RESPONSES TO QUESTION 15

<u>Value</u>	<u>NAVPRO</u>	<u>SUPSHIP</u>
1	1	0
2	1	2
3	1	2
4	3	3
5	1	2
6	1	1
7	0	1
8	3	0
9	0	0
10	0	0

Requirement: Public Law 100-180 requires that all contracting officers be evaluated on their efforts in this area. This was implemented by a message from the Office of Civilian Personnel Management requiring that a critical element be included in the performance plans for DON contracting officers, both PCO's and ACO's, assessing their efforts to increase both prime and subcontract awards to SDB's. [Ref. 24]

Responses: ACO's with collateral duties related to subcontracting with small disadvantaged business were evaluated on their efforts at five of the NAVPRO's and eight of the SUPSHIP's ACO's.

17. Question Seventeen

On a scale of 1-10, with 1 being not at all, how much does your ability to meet subcontracting goals affect your evaluation?

Requirement: There is no requirement that this element be given greater emphasis than other critical elements.

Responses: The responses for the ACO's with collateral duties in this area who were actually evaluated on their efforts to increase contracting opportunities to small disadvantaged businesses are listed in Table 2.

TABLE 2  
ACO RESPONSES TO QUESTION 17

<u>Value</u>	<u>NAVPRO</u>	<u>SUPSHIP</u>
1	1	0
2	1	3
3	2	2
4	0	3
5	1	0
6	0	0
7	1	0
8	0	0
9	0	0
10	0	0

18. Question Eighteen

Are other ACO's evaluated on their efforts in this area?

Requirement: See Question Sixteen.

Responses: ACO's who do not have a collateral duty related to small disadvantaged businesses were evaluated on their effort in this area at two of the NAVPRO's and three of the SUPSHIP's.

19. Question Nineteen

On a scale of 1-10, with 1 being not at all, how much does their ability to meet subcontracting goals affect their evaluation?

Requirement: See Question Seventeen.

Responses: The responses for the ACO's actually evaluated in this area who do not have a collateral duty related to small disadvantaged businesses are listed in Table 3.

TABLE 3  
ACO RESPONSES TO QUESTION 19

<u>Value</u>	<u>NAVPRO</u>	<u>SUPSHIP</u>
1	1	1
2	0	2
3	1	0
4	0	0
5	0	0
6	0	0
7	0	0
8	0	0
9	0	0
10	0	0

20. Question Twenty

What percent of the total subcontract dollars in contracts you administer goes to Small Disadvantaged Businesses?

Requirement: Congress has established the goal of awarding five percent of all subcontracting dollars to small disadvantaged businesses.

Responses: The responses ranged from a low of .5 to a high of 4.6 for the NAVPRO's and from a low of 1.0 to a high of 10 for the SUPSHIP's. See Table 4 for a complete listing of ACO responses to this question.

TABLE 4

ACO RESPONSES TO SELECTED QUESTIONS

NAVPRO:	1	3	15	16	17	18	19	20	21	22
A	N	N	3	N	-	N	-	5.2	5	5.2
B	N	N	4	N	-	N	-	1.5	5	1.0
C	N	N	3	Y	2	N	-	2.3/4.6	5/5	1.8/3.9
D	Y	N	4	N	-	N	-	.5	1.5	.5
E	Y	N	3	Y	3	N	-	1.3/4	5/0	.8/0
F	N	N	2	N	-	N	-	-	-	-
G	N	N	8	N	-	N	-	.73	5	.49
H	N	Y	5	Y	7	N	-	2	2	2.1
I	N	N	6	N	-	N	-	.5	2.5	1.5
J	N	N	1	Y	1	N	-	1	5	1
K	N	N	1	N	1	Y	1	-	-	-
L	N	N	8	Y	3	Y	3	2.3	5	.5
SUPSHIP:										
M	N	N	2	Y	3	N	-	1.5	2	2.2
N	N	Y	5	Y	2	N	-	8	5	5
O	Y	N	-	-	-	-	-	-	-	-
P	N	N	4	Y	2	Y	1	2.9	5	.73
Q	N	N	3	N	-	N	-	4.8	5	-
R	N	N	3	Y	3	N	-	1.5	5	1.4
S	N	N	6	Y	3	N	-	3.8	5	3.4
T	N	Y	7	N	-	N	-	4/10.8	5/9	5/9
U	N	N	2	Y	2	N	-	-	-	-
V	N	N	3	Y	4	Y	2	1.3	5	1.3
W	N	N	4	N	-	N	-	1.0	5	-
X	N	N	5	Y	4	Y	2	2	5	1.8

21. Question Twenty-one

What was the target for these contracts?

Requirement: Individual contracts do not have to have a target of five percent. However, any goal of less than five percent of the total subcontracting dollars must be approved two levels above the contracting officer. [Ref. 23:sec. 19.705-4]

Responses: The most common answer, five percent, was given by five NAVPRO's and eight SUPSHIP's. Answers ranged from 1.5, from a NAVPRO, to 9.0, from a SUPSHIP. See Table 4 for a complete listing of ACO responses to this question.

22. Question Twenty-two

How does this compare to previous years?

Requirement: There is no requirement to incrementally increase the use of small disadvantaged subcontractors. This question is included to assess the overall direction of the program.

Responses: Virtually all the activities reported an increase in the percent of subcontracting dollars awarded to small disadvantaged businesses during Fiscal Year 1988, compared to the previous year. See Table 4 for a complete listing of ACO responses to this question.

23. Question Twenty-three

What impediments do you see to further progress under this law?

Requirement: This question is included to obtain input from individuals responsible for implementing this program.

Responses: ACO's at several of the activities saw no impediments to further progress in meeting the five percent goal. Comments from those activities making suggestions are listed below in order of the frequency of the response. The total number of comments listed exceeds the total number of activities surveyed as some activities made more than one comment.

a. NAVPRO

1. Lack of SDB's. Difficulty of qualifying these businesses (6X);
2. Insufficient motivation for contractors to put greater emphasis in this area (3X);
3. Getting the concern for this program expressed by top management down to the lower management level (2X);
4. Reluctance by the prime contractor, responsible for over-all product quality, to use new subcontractors (2X);
5. Overuse of directed sourcing by the Navy (1X).

b. SUPSHIP

1. Lack of SDB's. Difficulty of qualifying these businesses (6X);
2. Insufficient motivation for contractors to put greater emphasis in this area (3X);
3. Confusion concerning requirements due to too many changes in the laws/regulations. Overlap between this program and the 8(a) program (2X);

4. Reluctance by the prime contractor, responsible for over-all product quality, to use new subcontractors (2X);
5. Overuse of directed sourcing by the Navy (1X).

24. Question Twenty-four

What changes, if any, would you recommend in the law?

Requirement: This question is included to obtain input from individuals responsible for implementing this program.

Responses: ACO's at several of the activities had no recommendations. Comments from those activities making suggestions are listed below in order of the frequency of the response. The total number of comments listed does not equal the total number of activities surveyed as some activities made more than one comment.

a. NAVPRO

1. Contracting Officers should be allowed to set realistic goals for this program (4X);
2. Reimburse the contractors for additional costs incurred to qualify and utilize SDB's as subcontractors (4X);
3. Base goals on a company-wide basis to reduce the administrative burden on contractors and contract administrators (1X);
4. Provide more incentives to contractors exceeding the contract goal (1X);
5. Put more teeth in the laws (1X).

b. SUPSHIP

1. Contracting Officers should be allowed to set realistic goals for this program (3X);

2. Provide more incentives to contractors exceeding the contract goal (2X);
3. Abandon the use of percent goals in favor of monetary goals (1X);
4. Put greater emphasis on breaking out non-technical requirements for subcontracting early in the program (1X);
5. Put more teeth in the laws (1X).

#### C. SUMMARY

This chapter has summarized the results of a series of telephone interviews conducted with ACO's at NAVPRO and SUPSHIP activities throughout the country. As stated in the introduction to this chapter, the questionnaire used to conduct the interviews was designed to accomplish a number of objectives.

Chapter V will analyze the results of the interviews.



## V. DATA ANALYSIS

### A. INTRODUCTION

As stated in Chapter IV, the questionnaire used to conduct the interviews was designed to evaluate several aspects of contract administration. First, it examined compliance with the regulations implementing Public Laws 99-661 and 100-180. Second, it assessed the impact of this law on the use of SDB's as subcontractors. Third, it measured the level of command support for this program. Finally, it used open-ended questions to ascertain actions an ACO took when a contractor didn't meet the requirements of a subcontracting plan. It also asked ACO's to identify impediments to further progress under this law as well as to suggest improvements to this program. The analysis will be performed by reviewing questions based on the categories described above.

The statistical analysis referred to throughout this chapter was performed using two programs from Minitab, one of many statistical packages available. The first program used is called Two Sample T. This technique is appropriate for conducting a hypothesis test for two normally distributed populations when the samples are independent and the population standard deviations are unknown. A second program was used to corroborate the first test. This

program, the Mann-Whitney test, assumes only that the two populations being considered have the same shape. In each case, the test was performed at the 5% significance level.

The Two Sample T test is more powerful than is the Mann-Whitney. That is, it is more capable of determining if two groups statistically differ from each other. The Mann-Whitney test, however, may be superior when the sample size is small, as it is in several of the tests here and when assumptions of the other test may not be valid. The two populations tested here are the NAVPRO's and the SUPSHIP's or Evaluated ACO's and Non-Evaluated ACO's.

#### B. COMPLIANCE WITH PUBLIC LAWS 99-661 AND 100-180

Questions 4, 5, 6, 7, 8, 10, 11, 14, 16, 18 measure compliance with these laws. All these questions were based upon specific requirements found within the FAR or DFARS and pertained to the activities surveyed. In general, the activities are in compliance with the regulations, though certain requirements are not being met at some of the activities.

All the activities meet or exceed the requirement for monitoring contractor performance. Nearly half of the NAVPRO's go beyond the basic requirement of reviewing the SF 294/295 to assess contractor compliance in this area. One fourth of the SUPSHIP's also routinely review contractor records in this area (Question 4). At these activities, an

in-depth review of the contractor's purchasing records is conducted to assess contractor efforts in this area.

Similarly, the information is received and reviewed at the appropriate level in most instances. This is true at all the NAVPRO's where these reports are directed to either the SADBUS, Deputy Director for Small Business, or the ACO, all of whom are within the Contract Administration Office as required. These reports are also reviewed by the Contract Administration Office at nine of the 11 SUPSHIP's that receive them. At one of the other SUPSHIP's the reports are reviewed by an analyst within the PCO Branch while one SUPSHIP doesn't even review these forms. At only one activity, a SUPSHIP, does the ACO and SADBUS review these reports together (Questions 5, 6).

The review is only the first step in the effective administration of this program. The next question is how the information is used. ACO's at seven of the NAVPRO's and four of the SUPSHIP's indicated that this information was used to assess contractor performance. Several of the NAVPRO's and SUPSHIP's indicated that the information is of limited value. For example, it is especially difficult to assess contractor compliance based on the reports received early in the contract performance (Question 7).

There is a difference between the NAVPRO's and the SUPSHIP's as to the weight afforded information in these reports. This difference arises from the fact that a

contractor at a NAVPRO may be performing on several contracts simultaneously. Although each of these contracts are reported on individually by the SF 294, overall the contractor is working towards a company-wide goal which is reported on with the SF 295. The failure to achieve the subcontracting goal on one contract may be offset by the performance on another contract. This is not as much of a problem at shipyards, especially the smaller ones. As a result, NAVPRO's are more likely to rely on methods other than these reports to assess contractor performance.

An adequate assessment of contractor performance is not being done in some instances. As noted earlier, two of the four SUPSHIP's that rely upon these reports examine them in detail. The other two SUPSHIP's don't review the data in detail nor do they utilize other methods to collect data. Three of the NAVPRO's that rely upon these reports to assess contractor performance also indicated that the review was cursory (Question 7).

Contracting officers are not evaluating past performance in this area in awarding contracts. Only five of the NAVPRO ACO's and one SUPSHIP ACO indicated that prospective PCO's contacted them concerning a contractor's past performance prior to awarding subsequent contracts. SUPSHIP ACO's pointed out that the reports are forwarded to NAVSEA and that the PCO's might be assessing past performance on those records. Under the FAR, however, this is a duty of the ACO.

Given the widespread use of information to supplement that contained in these reports as indicated above, moreover, a PCO may not be able to adequately assess past performance by reviewing the SF 294/295 (Questions 7, 14).

A SUPSHIP ACO is more likely to take action when the contractor isn't making sufficient progress than a NAVPRO ACO (Question 10). This is probably due to the weight given information contained in the reports, especially the early ones, by NAVPRO ACO's. They also take a wider range of actions than their NAVPRO counterparts. The NAVPRO ACO's limited their action to enhanced surveillance of contractor buying actions. None of the SUPSHIP ACO's took this action though three of them wrote letters to the contractor requesting amplifying information on why the contractor wasn't meeting the subcontracting goal (Question 11).

The diverse actions of the various ACO's is not surprising in that no specific action is required by the FAR other than notifying the Contracting Officer when the contractor is not meeting his requirements. An additional duty to document the file for future use is implied in the requirement that prospective contracting officers ascertain past performance by a contractor. The interviews indicated that the NAVPRO ACO's aren't meeting either of these requirements. The SUPSHIP ACO's were in compliance with the notification requirement at one activity and were documenting the files at two activities (Question 11).

Neither the NAVPRO's nor the SUPSHIP's are routinely evaluating the ACO's on their efforts to increase subcontracting awards to small disadvantaged businesses (Questions 16, 18). It was particularly surprising to find that ACO's with collateral duties in this area were not evaluated on their efforts at more than half the NAVPRO's and at one-third of the SUPSHIP's (Question 16). Only one quarter of the activities contacted evaluate ACO's with no specific collateral duties in this area. This is in spite of Public Law 100-180 and the message that implements the law that states that all Contracting Officers, including ACO's and PCO's will be evaluated in this area.

This is not an oversight in many cases. Several of the NAVPRO ACO's indicated that their parent command, specifically Strategic Systems Programs Office (SSPO), has exempted ACO's from being evaluated in this area. In general, there is a perception at the commands contacted that contract administration is not a vital factor in increasing the percent of contract dollars awarded to these businesses.

As noted in III.A, the Director or Deputy Director of contracting at each activity was contacted. The researcher explained the purpose of the research was to identify barriers to further progress under the laws concerning subcontracting with small disadvantaged businesses. In approximately one-half of the cases, the Director explained that his was a contract administration organization that

didn't have much to do with achieving the five percent goal established by Congress. Therefore, it is not surprising that ACO's are routinely not evaluated in this area.

#### C. COMMAND SUPPORT FOR THE SUBCONTRACTING PROGRAM

Questions 1 2, 3, 13, 15, 17, and 19 assess this aspect of contract administration. None of these questions are based upon actual requirements, but indicate the importance the command places on this program. Several of the questions are subjective in nature and asked the respondents to indicate their perception of their command's emphasis on this program on a scale of 1-10.

In general, command support for this program is weak. Only one NAVPRO and one SUPSHIP provide training in this area at the command though ACO's with collateral duties related to subcontracting with SDB's receive training outside the command (Questions 1, 2). A similar number of commands have Instructions that deal with this program in any detail. The rest of the commands have Instructions that broadly outline the duties of the SADBUS but do not address specific requirements of this program.

Activities do not take actions against the contractor for failing to meet contract requirements in this area. This is due, in part, to the fact that contractors do not need to achieve the goals stated in the contract, but rather, need only make a good faith effort to do so. It also reflects the feeling expressed by several ACO's in

response to Question Fourteen that contracting officers are primarily concerned with having a subcontracting plan in the file and aren't as concerned with the contents of the plan. None of the ACO's had ever taken any of the actions described in Question Twelve, such as reducing progress payments or recommending against the use of the same contractor in subsequent contracts (Question 13).

The ACO's were asked to rate the emphasis their command placed on compliance with small disadvantaged business subcontracting plans, relative to other contract provisions. A majority of the NAVPRO ACO's (66%), with a mean rating of 4.8%, and a large majority of SUPSHIP ACO's (81%), with a mean rating of 4.1%, rated it as 5 or lower on a scale of 1-10 with 1 being low (Question 15). The data do not provide sufficient evidence to conclude that there is a difference in mean ratings for the two groups of ACO's.

It is interesting to note that two of the three ACO's that rated their command as an 8 are not evaluated on their efforts in this area. This apparently inconsistent situation is explained by the fact that these are both SSPO activities. As discussed earlier, SSPO has chosen not to evaluate ACO's in this area.

The ACO's were also asked how their ability to meet subcontracting goals affected their evaluation on a scale of 1-10, with 1 being low. For ACO's with significant collateral duties in this area, over 80% of the NAVPRO ACO's, with a



mean response of 3.5, and all of the SUPSHIP ACO's with a mean response of 3.0, rated this as 5 or lower (Question 17). For ACO's without significant collateral duties in this area, only one ACO rated the significance of this area above 3. The mean value for NAVPRO ACO's was 3.33 and for SUPSHIP ACO's was 1.667. The data do not provide sufficient evidence to conclude that there is a difference in mean ratings between NAVPRO and SUPSHIP ACO's.

#### D. SUBCONTRACTING WITH SMALL DISADVANTAGED BUSINESS

The use of SDB's as subcontractors was measured by Questions 20, 21 and 22. The data in Table 4 were evaluated to determine if there was any difference in the level of subcontracting between NAVPRO's and SUPSHIP's. They were also evaluated to determine if a difference existed based upon whether or not ACO's at the activity were evaluated in this area. The results of the statistical analysis are contained in Appendix B.

The first aspect tested was whether there was any difference between NAVPRO's and SUPSHIP's in the level of subcontracting with SDB's. This test was performed to determine if either type of activity was more successful in this program than the other. If so, further analysis of the data may have uncovered why the difference existed.

The data do not provide sufficient evidence to conclude that there is a difference between NAVPRO's and SUPSHIP's in the level of subcontracting with SDB's in Fiscal Year 1988

(Appendix B, Question 1), the goals set for individual contracts for Fiscal Year 1988 (Appendix B, Question 2), or the level of subcontracting with SDB's in Fiscal Year 1987 (Appendix B, Question 3).

In all three cases, the P value calculated is larger than .05, the significance level tested for. Consequently, the null hypothesis for each situation cannot be rejected. The P value approaches the .05 level for the results obtained in Fiscal Years 1987 and 1988, however. If the test had been one-tailed, that is, tested to see if one group was larger than the other, or tested at a .10 level, the results would have been statistically significant.

A second aspect tested for was if subcontracting with SDB's was greater for those activities that evaluated ACO's in this area. The data do not provide sufficient evidence to conclude that activities that evaluate ACO's in this area subcontract a greater percentage of their total subcontracting dollars with SDB's than do activities that do not evaluate ACO's in this area.

This was determined by comparing the percentage of subcontracting dollars for NAVPRO's that responded "yes" on Question Sixteen to those that answered "no" (Appendix B, Question 4). The test was repeated for SUPSHIP's for Question Sixteen (Appendix B, Question 5). Finally, this procedure was repeated for NAVPRO's and SUPSHIP's for Question Eighteen (Appendix B, Questions 6, 7).

In no case is the resulting P value smaller than .05, the significance level tested for. Again, the null hypothesis can not be rejected in any of the situations.

A related area tested was if activities that evaluate ACO's in this area had experienced a greater increase in the use of SDB's as subcontractors than those who don't evaluate ACO's in this area since Fiscal Year 1987. The data do not provide sufficient evidence to conclude that they do.

As was done earlier, the NAVPRO's and the SUPSHIP's were subdivided depending on their response to Question Sixteen (Appendix B, Questions 8, 10) or Eighteen (Appendix B, Questions 9, 10). The increase in subcontracting dollars for each activity was obtained by subtracting the 1987 figure (Question 22) from the 1988 figure (Question 20). In a number of instances, the figure for 1987 was unavailable. These activities were excluded from the comparison.

Based upon the activities evaluated, in no case is the resulting P value smaller than .05, the significance level tested for. As before, the null hypothesis can not be rejected in any of the situations. Again it is worth noting that the calculated P value in some of these tests is very close to being statistically significant.

Table 4, from Chapter IV, demonstrates the tenuous relationship between command support and results achieved to date under this program. For example, at NAVPRO A, ACO's are not evaluated in this area, nor is perceived support for

this program high, yet this activity had the highest percent of subcontracting with SDB's of any NAVPRO. Similarly, at NAVPRO H, where ACO's are evaluated in this area, subcontracting with SDB's decreased slightly from Fiscal Year 1987 to 1988.

The results for the SUPSHIP activities are equally non-conclusive. SUPSHIP N, where ACO's are evaluated in this area and which has a high perceived level of command support, had a high level subcontracting with SDB's and showed a significant increase in the use of SDB's for this period. On the other hand, the results were not very good at either SUPSHIP V and X where the ACO's are evaluated in this area.

#### E. ACO'S ACTIONS, COMMENTS AND SUGGESTIONS

Questions 9 and 12 inquired as to steps an ACO might take if a contractor does not comply with the subcontracting plan. Questions 23 and 24 requested comments and suggestions to improve this program. The vast majority of ACO's said that they informally solicited additional information from the contractor when required reports indicate that the contractor is not meeting contract goals (Question 9). This reflects the ongoing nature of contract administration and the need for cooperation between the contracting parties. Cooperation has been described as more than good sense in the administration of contracts, but rather a legal requirement. It depends upon "the development of an attitude of

mutual confidence and respect between Government and contract officials." [Ref. 25:p. 4] As such, this informal approach protects the Government's interests while ensuring compliance with the contract.

Virtually none of the ACO's even hypothetically agreed that failure of the contractor to meet subcontracting goals would justify termination of the contract for default (Question 12(c)). This reflects the fact that, for a number of the activities contacted, the contractor is a sole source producer. Several of the ACO's specifically said that this situation precluded this approach.

Over half of the ACO's said that they would recommend against the use of a contractor due to that contractor's noncompliance with a previous plan. Again, however, a sole source situation would effectively preclude this option from being employed (Question 12(d)). Furthermore, few of the ACO's indicated that they would specifically note this failure in the contract file (Question 11) so it is doubtful that an ACO would make a strong recommendation against such a contractor. Finally, it has been shown that PCO's do not routinely request this information from ACO's (Question 14).

A majority of the NAVPRO ACO's and four of the SUPSHIP ACO's said that progress payments are an appropriate mechanism to recognize contractor performance in this area (Question 12(a)). This view is not shared throughout DOD. One official in the Office of the Secretary noted that

progress payments "are a financing mechanism and should not be used as a vehicle to achieve other goals." [Ref. 26:p. 429] Congress has determined that failure to comply with this portion of the contract is a material breach of the contract, and failure to be in material compliance with the contract is cause for the reduction of progress payments.

The use of liquidated damages did not have widespread support among the ACO's (Question 12(b)). Less than half the NAVPRO ACO's and only two of the SUPSHIP ACO's said they would favor the use of such a clause in a contract to enforce subcontracting plans. The reluctance to utilize this approach stemmed from two concerns.

The first concern was that the five percent goal was unachievable for many contractors. Because of this, several ACO's did not think it would be appropriate to insert this clause into a contract requiring this level of subcontracting. There was some additional support for this idea providing the requirement could be negotiated on an individual basis and not be tied to the five percent goal mandated by Congress.

Even then, however, the fact that subcontracting results have to be evaluated on a best effort basis caused concern with several ACO's. As one ACO stated, "We don't even assess liquidated damages for late delivery, let alone something like this." Yet another ACO commented that it would be virtually impossible to show a lack of good faith

by a contractor in this area if the contractor went through the steps contained in the subcontracting plan.

Under the recent legislation mandating a liquidated damages clause in contracts requiring a subcontract plan, a contractor will be held to the good faith standard. Additionally, the decision of a contracting officer regarding the amount of liquidated damages will be subject to the Contract Disputes Act of 1978. Neither the ACO's nor the law addressed a key issue in assessing liquidated damages. This is the requirement that the Government must be able to show it has suffered some unquantifiable loss in order to collect these damages. The Government will be hard pressed to justify a specific assessment in any appeal under the Disputes Act. It is too early, however, to assess the implementation of this law.

ACO's consistently identified two impediments to further progress in this area. The most often cited impediment was the lack of small businesses or the difficulty in getting them qualified. The second most frequently cited problem was insufficient motivation for contractors to put greater emphasis in this area (Question 23).

The first of these problems has often been cited as a major impediment to further programs in this area. A report prepared by the Aerospace Industry Association found that only 0.6 percent of the GNP is accounted for by SDB's. The report also found that the high technology industries, such

as electronics, had even fewer SDB's than this figure.  
[Ref. 26:p. 429]

A related issue was the high cost of qualifying SDB's coupled with the inability to pass these costs on to the Government. These costs are reimbursable only if they are allowable, allocable, and reasonable. Again, this was seen as a major problem in high tech fields where the costs of implementing quality assurance programs, above and beyond commercial requirements, are significant.

The second of the impediments most frequently cited was the lack of incentives offered to primes in this area. Public Law 95-507 authorized federal agencies to include incentive clauses in negotiated contracts as a means of encouraging subcontracting opportunities for SDB's. As implemented in the DAR, contractors were eligible for an additional payment based on a percentage (not to exceed ten percent as assigned by the contracting officer) of the dollar value of subcontract awards in excess of the goals stated in the subcontracting plan. [Ref. 12:p. 72] Public Law 99-661 enhanced this by providing for an award equal to ten percent of the subcontracts awarded in excess of the five percent goal.

The problem is not that an incentive hasn't been available. It has not been used. A GAO review of contracts discussed in Chapter II found that of 411 contracts reviewed at NAVSEA, only 30 of them contained this clause. None of



the contracts reviewed at NAVAIR or SSPO contained this clause. [Ref. 14:p. 20]

The suggested changes to this program followed from the perceived problems. Two suggestions were made much more frequently than any others. The first was to allow contracting officers to set realistic goals for each contract. The second was to provide more incentives to contractors to encourage more progress under this program (Question 24).

#### F. SUMMARY

This chapter analyzed the responses from the ACO's obtained during the interviews. The analysis focused on four aspects of contract administration. These were compliance with regulations, command support, results obtained and ACO actions as well as suggestions for improving the program.

Overall, the activities evaluated were in compliance with FAR and DFARS requirements. Command support for the small disadvantaged program was weak at the activities. A statistical analysis of the responses showed that it cannot be said that the level of subcontracting with SDB's was different at NAVPRO's than it was at SUPSHIP's in either Fiscal Year 1987 or 1988. Nor was there any difference in the level of subcontracting between activities based upon ACO's being evaluated on their efforts in this area. Finally, various comments and suggestions from the ACO's

were analyzed to see if any common concerns existed among the different activities.

Chapter VI will present the conclusions and recommendations for this study.

## VI. CONCLUSIONS AND RECOMMENDATIONS

### A. CONCLUSION ONE

Conclusion: Congress is interested in this program and can be expected to be active in this area in the future.

Discussion: Congress has placed specific requirements in each of the last three DOD Appropriation or Authorization Acts increasing DOD's requirement to deal with SDB's.

Public Law 99-661 established the goal that five percent of all DOD contracts in Fiscal Years 1987 through 1989 be awarded to SDB's. Public Law 100-180 expanded this goal to include subcontracts established under all large contracts. Public Law 100-456 extended these laws through Fiscal Year 1990.

Additionally, Congress continues to show concern with DOD's compliance with this program. A GAO report that indicated that the Navy wasn't aggressively implementing Public Law 95-507, resulted in a hearing to clarify this issue. Ultimately, the Committee holding the hearing satisfied itself that the Navy was complying with the requirement to obtain an adequate subcontracting plan in each large contract. It took the testimony of COMNAVAIR to do this, however.

Recommendation: It is imperative that DOD take the appropriate actions to implement these laws. Specifically,

all ACO's should be evaluated in this area as required by law. Also, contractors need to be held to their subcontracting plan.

Discussion: The message implementing the provision that contracting officers be evaluated in this area required that a critical element measuring this effort be placed in all contracting officers' performance plans by 30 September 1988 [Ref. 24]. Several activities have specifically declined to implement this requirement. This is not their decision. Congress has determined that all contracting officers will be evaluated in this area. The only acceptable course of action is to comply with the law.

Not one ACO from the group studied has ever taken any action against a contractor for failing to meet the subcontracting plan. It is true that a contractor only needs to make a good faith effort to be in compliance with this provision. Still, it is hard to believe that all contractors have met this test when less than three percent of DOD subcontracting is done with SDB's. Further, few of the contractors in this study met the contractual goals. There is no reason to believe that contractors will expend greater efforts in this area in the absence of actions by ACO's.

## B. CONCLUSION TWO

Conclusion: Senior personnel throughout DOD have not fully understood the strong Congressional support this program enjoys.

Discussion: Until recently, DOD has operated in a reactive fashion, rather than a proactive mode towards this program. This has resulted in Congress passing certain provisions opposed by DOD.

The meager level of contracting with SDB's under Public Law 95-507 led to the passage of Public Law 99-661. This law, designed to cover a three year period, wasn't fully implemented for almost two years. One could argue that the subsequent enactment of Public Law 100-180 slowed the final implementation of Public Law 99-661. Public Law 100-180 was passed in part, however, to voice Congressional concern with the slow implementation of Public Law 99-661.

Defense officials have consistently opposed Congressional initiatives to put enforcement mechanisms into these laws. Various DOD Secretaries have opposed the basic laws, the use of liquidated damages for contractors who fail to meet their subcontracting plan, and increased progress payment rates as a method of motivating contractors in this area. At the same time, DOD has not suggested alternatives to these various proposals. It is not surprising then that Congress has often down-played DOD's opposition to proposed legislation.

Given this analysis, the recent DOD proposal, discussed in Chapter III, is a positive step. Some of the provisions in the proposal, such as the use of progress payments, were previously opposed by DOD. Other provisions are new. For example, under the proposal, prime contractors would be reimbursed for expenses incurred in qualifying SDB subcontractors. Overall, this proposal is responsive to Congress's concerns and shows a willingness by DOD to independently initiate action to increase the percent of dollars awarded to SDB's.

Recommendation: The Navy, as well as DOD, should continue the recent trend of being proactive in this area. Further steps need to be taken to remove specific barriers faced by SDB's in contracting with DOD. Finally, actions need to be taken to achieve the over-all aim of this program--to develop SDB's capable of competing in the civilian market against established companies.

Discussion: The SDB program is not going to go away. By taking the initiative, DOD can maintain better control over the rules it will have to operate under. As discussed elsewhere, the plan that the Navy presented to Congress deals directly with those problems most often identified by ACO's as impediments to further progress towards meeting the five percent goal of subcontracting with SDB's.

A significant barrier to the increased use of SDB's according to the ACO's has been the overuse of directed

sourcing by the Navy. A related problem has been the reluctance of contractors to try new subcontractors out of fear that the new source would jeopardize over-all product quality. Neither of these concerns are peculiar to this program. The Navy has made great strides in reducing these barriers to competition in other areas. Coordination between the Competition Advocate and the Navy's SDB liaison could identify particular programs in which those techniques used to break out components for competition could be used to increase SDB subcontracting opportunities.

Attention needs to be paid to the goal of this program which is to use the DOD procurement process as a method of developing viable minority-owned businesses capable of competing in the civilian market. To that extent, initiatives that make firms dependent upon DOD business are self-defeating in the long run. Efforts have to be directed towards developing SDB's in those areas expected to have significant private sector application. Similarly, the transfer of aging technology to these firms is not likely to enhance their ability to compete in the private sector in the future.

#### C. CONCLUSION THREE

Conclusion: The five percent goal for subcontracting with SDB's is seen as unrealistic by ACO's. Congress has also recognized the difficulties in achieving this goal in the near future.

Discussion: As noted earlier, the vast majority of the contracts administered at NAVPRO and SUPSHIP activities require that five percent of the subcontracting dollars be awarded to SDB's. This goal was met at one NAVPRO and two SUPSHIP activities in Fiscal Year 1988. Yet, none of the ACO's were dissatisfied with the performance of the prime contractor in this area, nor had any of the ACO's taken actions to increase compliance in this area. The overwhelming consensus of the ACO's in the interviews was that there were only so many SDB's available and that as long as the contractor complied with the steps in the subcontracting plan, the contractor was meeting the good faith compliance standard. More progress towards the five percent goal would be made if contractors were gradually moved toward this level over a period of time.

In the recent legislation mandating the use of liquidated damages when a contractor fails to meet the goal called for in the contract, Congress has backed away from the five percent requirement. The law calls for the use of goals that are attainable based on subcontracting opportunities within the contract, the availability of subcontractors and past performance of the contractor.

The DOD proposal discussed in Chapter III also implicitly backs away from the carte blanche use of a five percent goal. This plan would even allow for the payment of an incentive fee to a contractor who awards less than five



percent of the subcontracts to SDB's provided the total subcontracted exceeded the contract goal.

Recommendation: Realistic goals should be negotiated for each contract. This could be done by setting goals for a contract based on past performance. Under this method, the level of subcontracting attained by a contractor in a previous contract would serve as a benchmark for negotiating a new, higher goal that is attainable for a given contractor. New contractors, or those without recent major contracting basis would be held to an industry average tempered by subcontracting opportunities within the contract and the experience of other recent, similar contracts.

Discussion: The five percent goal set by Congress is just that--a goal. Too often a five percent goal is placed in the contract when both parties know that the goal just isn't attainable. This creates a situation where the contractor is not motivated to reach an artificial goal and the ACO doesn't hold the contractor to this standard. The use of a mutually agreed-upon goal that is attainable, would allow the ACO to hold a contractor to that goal and reward or penalize a contractor accordingly.

#### D. CONCLUSION FOUR

Conclusion: The sole source nature of much of the work performed at the activities evaluated limits the actions available to an ACO.

Discussion: It is unrealistic to talk about a Termination for Default in this area. Similarly, past performance evaluation in such a situation is of limited value if a contractor is a sole source. This is not to say that past performance is irrelevant, however. It is still imperative that past performance be considered in establishing goals for a new contract. As noted above, the recent legislation dealing with liquidated damages specifically requires that a contractor's past performance be considered in establishing subcontracting goals for a new contract.

Given the limited ability to terminate the contract or to utilize a different contractor in subsequent contracts, an ACO must utilize other techniques to motivate a contractor. The proposed DOD plan would go a long way to provide these tools. It utilizes progress payments, an expanded basis for calculating incentives available to a contractor that exceeds his goals and explicitly allows for the recovery of expenses associated with qualifying an SDB subcontractor. These were all cited as desirable changes to this program by ACO's during the interviews. Additionally, it puts teeth into the enforcement of this program by providing for lower payments for those contractors who fail to meet the agreed-upon goals. Again, lack of enforcement mechanisms was often cited by the ACO's as a problem in increasing contractor performance under this program.

Recommendation: Contractors should be rewarded or penalized based upon performance in this area.

Discussion: The subcontracting plan is a major clause in a contract and ACO's should treat it as such. Congress has declared that failure to meet this requirement is a material breach of the contract. Even if Termination for Default is not possible, other incentives can be negotiated into the contract to motivate a contractor in this area. The plan discussed in Chapter III provides the framework for these incentives.

#### E. CONCLUSION FIVE

Conclusion: There was no statistically significant increase in the level of subcontracting with SDB's between Fiscal Years 1987 and 1988. There was no statistically significant difference in the level of subcontracting with SDB's between those activities evaluating ACO's in this area and those that don't.

Discussion: A number of factors must be considered. First, the sample size used in several of the comparisons was small. Thus, an outlier may have unduly influenced the analysis, in effect concealing the true relationship. Secondly, the requirement to subcontract five percent of the dollars with SDB's is a fairly recent one, as is the requirement to evaluate ACO's in this area. It is possible that the full effects of these two requirements have yet to materialize. Finally, it is altogether possible that ACO's

do not have sufficient opportunity to have an impact on this figure. That is, they may have limited input to the subcontracting plan, and minimal opportunity to influence a contractor during the performance of the contract.

Recommendation: Additional studies need to be done in this area over the next two years to allow the impact of these laws to materialize.

APPENDIX A

LISTING OF ACTIVITIES CONTACTED

A. NAVPRO'S

FMC Northern Ordinance Div.	Minneapolis, MN
General Dynamics	Pomona, CA
General Electric Co.	Lynn, MA
General Electric Co.	Pittsfield, MA
Grumman Aerospace Corp.	Bethpage, NY
Hercules Aerospace Div. (NAVBRO)	Magna, UT
Laurel	Laurel, MD
Lockheed California Co.	Burbank, CA
Lockheed Missile & Space Inc., Missile System Div.	Sunnyvale, CA
McDonnell Douglas Corp.	St. Louis, MO
United Tech. Corp., Sikorsky Aircraft Div.	Stratford, CT
Unysis Corp.	Great Neck, NY
Westinghouse Electric Corp., Oceanic Div.	Annapolis, MD

B. SUPSHIP'S

Bath, ME  
Brooklyn, NY  
Charleston, SC  
Groton, CT  
Jacksonville, FL  
Long Beach, CA  
Newport News, VA  
New Orleans, LA  
Portsmouth, VA  
San Francisco, CA  
Seattle, WA  
Sturgeon Bay, WI

## APPENDIX B

### STATISTICAL ANALYSIS OF SELECTED DATA

1. In Fiscal Year 1988, was the percentage of dollars subcontracted with SDB's different at NAVPRO's than it was at SUPSHIP's?

Null Hypothesis: The mean percentage of NAVPRO subcontracts equalled the mean percentage of SUPSHIP subcontracts.

Statistical Analysis:

ROW	C1 NAVPRO	C2 SUPSHIP
1	2.30	2.0
2	0.50	1.5
3	2.00	1.0
4	0.73	1.3
5	3.00	4.8
6	1.30	10.8
7	0.40	3.8
8	0.50	1.5
9	2.30	4.8
10	4.60	2.9
11	1.50	8.0
12	5.20	
13	1.00	

THOSAMPLE T FOR C1 VS C2				
	N	MEAN	STDEV	SE MEAN
C1	13	1.95	1.54	0.43
C2	11	3.85	3.12	0.94

95 PCT CI FOR MU C1 - MU C2: (-4.12, 0.31)  
TTEST MU C1 = MU C2 (VS NE): T=-1.84 P=0.086 DF=14.1

Mann-Whitney Confidence Interval and Test

C1            N = 13        MEDIAN =        1.5000  
C2            N = 11        MEDIAN =        2.9000  
POINT ESTIMATE FOR ETA1-ETA2 IS        -0.9986  
95.1 PCT C.I. FOR ETA1-ETA2 IS (        -3.4,        0.2)  
W =        132.5  
TEST OF ETA1 = ETA2 VS.    ETA1 N.E. ETA2 IS SIGNIFICANT AT    0.0874  
CANNOT REJECT AT ALPHA = 0.05

2. In Fiscal Year 1988, was the goal for subcontracting with SDB's different at NAVPRO's than it was at SUPSHIP's?

Null Hypothesis: The mean percentage of NAVPRO goals equalled the mean percentage of SUPSHIP goals.

Statistical Analysis:

ROW	C3 NAVPRO	C4 SUPSHIP
1	5.0	5.0
2	2.5	2.0
3	2.0	5.0
4	5.0	5.0
5	5.0	5.0
6	5.0	9.0
7	0.0	5.0
8	1.5	5.0
9	5.0	5.0
10	5.0	5.0
11	5.0	5.0
12	5.0	
13	5.0	

TWOSAMPLE T FOR C3 VS C4

	N	MEAN	STDEV	SE MEAN
C3	13	3.92	1.77	0.49
C4	11	5.09	1.58	0.48

95 PCT CI FOR MU C3 - MU C4: (-2.59, 0.25)

TTEST MU C3 = MU C4 (VS NE): T=-1.71 P=0.10 DF=21.9

MTB > mannw c3 c4

Mann-Whitney Confidence Interval and Test

C3            N = 13        MEDIAN =        5.0000  
C4            N = 11        MEDIAN =        5.0000

POINT ESTIMATE FOR ETA1-ETA2 IS        0.0008

95.1 PCT C.I. FOR ETA1-ETA2 IS (        -3.00,        -0.01)

W =        142.0

TEST OF ETA1 = ETA2 VS. ETA1 N.E. ETA2 IS SIGNIFICANT AT    0.2466

CANNOT REJECT AT ALPHA = 0.05

3. In Fiscal Year 1987, was the percentage of dollars subcontracted with SDB's different at NAVPRO's than it was at SUPSHIP's?

Null Hypothesis: The mean percentage of NAVPRO subcontracts equalled the mean percentage of SUPSHIP subcontracts.

#### Statistical Analysis:

ROW	C5 NAVPRO	C6 SUPSHIP
1	0.50	2.20
2	1.50	1.30
3	2.10	5.00
4	0.49	9.00
5	2.80	3.40
6	0.80	1.40
7	0.50	0.73
8	1.80	5.00
9	3.90	
10	1.00	
11	5.20	
12	0.00	
13	1.00	

TWO-SAMPLE T FOR C5 VS C6

	N	MEAN	STDEV	SE MEAN
C5	13	1.66	1.51	0.42
C6	8	3.50	2.76	0.98

95 PCT CI FOR MU C5 - MU C6: (-4.25, 0.56)  
TTEST MU C5 = MU C6 (VS NE): T=-1.73 P=0.12 DF=9.6

MTB > mannwc5 c6

#### Mann-Whitney Confidence Interval and Test

C5	N = 13	MEDIAN =	1.0000
C6	N = 8	MEDIAN =	2.8000

POINT ESTIMATE FOR ETA1-ETA2 IS -1.2502  
95.4 PCT C.I. FOR ETA1-ETA2 IS (-4.0, 0.2)  
N = 119.0  
TEST OF ETA1 = ETA2 VS. ETA1 N.E. ETA2 IS SIGNIFICANT AT 0.0888  
CANNOT REJECT AT ALPHA = 0.05



4. In Fiscal Year 1988, was the percentage of dollars sub-contracted with SDB's greater at NAVPRO's that evaluated ACO's with significant collateral duties in this area than at NAVPRO's that did not evaluate these ACO's?

Null Hypothesis: The mean percentage of subcontracts at NAVPRO's evaluating these ACO's was equal to or less than the mean percentage of subcontracts at NAVPRO's not evaluating these ACO's.

#### Statistical Analysis:

ROW	C7	C8
	YES	NO
1	2.3	0.50
2	2.0	0.73
3	3.0	0.50
4	5.0	1.50
5	0.0	5.20
6	5.0	
7	5.0	
8	1.0	

TWO SAMPLE T FOR C7 VS C8				
	N	MEAN	STDEV	SE MEAN
C7	8	2.91	1.94	0.69
C8	5	1.69	2.01	0.90

95 PCT CI FOR MU C7 - MU C8: (-1.38, 3.83)  
 TTEST MU C7 = MU C8 (VS GT): T=1.09 P=0.15 DF=8.4

#### Mann-Whitney Confidence Interval and Test

C7	N =	8	MEDIAN =	2.6500
C8	N =	5	MEDIAN =	0.7300
POINT ESTIMATE FOR ETA1-ETA2 IS			1.5002	
95.2 PCT C.I. FOR ETA1-ETA2 IS (			-0.7,	4.3)
N = 63.0				
TEST OF ETA1 = ETA2 VS. ETA1 G.T. ETA2 IS SIGNIFICANT AT 0.1707				
CANNOT REJECT AT ALPHA = 0.05				

5. In Fiscal Year 1988, was the percentage of dollars sub-contracted with SDB's greater at NAVPRO's that evaluated ACO's without significant collateral duties in this area than at NAVPRO's that did not evaluate these ACO's?

Null Hypothesis: The mean percentage of subcontracts at NAVPRO's evaluating these ACO's was equal to or less than the mean percentage of subcontracts at NAVPRO's not evaluating these ACO's.

#### Statistical Analysis:

ROW	YES C9	NO C10
1	2.3	0.50
2	0.3	2.00
3		0.73
4		1.30
5		0.40
6		0.50
7		2.30
8		4.60
9		1.50
10		5.20
11		1.00

#### THOSAMPLE T FOR C9 VS C10

	N	MEAN	SIDEV	SE MEAN
C9	2	1.30	1.41	1.0
C10	11	1.82	1.65	0.50

95 PCT CI FOR MU C9 - MU C10: (-14.7, 13.67)

TTEST MU C9 = MU C10 (VS GT): T=-0.47 P=0.64 DF=1.5

#### Mann-Whitney Confidence Interval and Test

C9 N = 2 MEDIAN = 1.3000  
 C10 N = 11 MEDIAN = 1.3000  
 POINT ESTIMATE FOR ETA1-ETA2 IS -0.2000  
 96.2 PCT C.I. FOR ETA1-ETA2 IS ( -4.90, 1.90)  
 W = 11.5  
 TEST OF ETA1 = ETA2 VS. ETA1 G.T. ETA2 CANNOT REJECT SINCE W IS L.T.

14.0

6. In Fiscal Year 1988, was the percentage of dollars sub-contracted with SDB's greater at SUPSHIP's that evaluated ACO's with significant collateral duties in this area than at SUPSHIP's that did not evaluate these ACO's?

Null Hypothesis: The mean percentage of subcontracts at SUPSHIP's evaluating these ACO's was equal to or less than the mean percentage of subcontracts at SUPSHIP's not evaluating these ACO's.

Statistical Analysis:

ROW	C11	C12
	YES	NO
1	2.0	1.0
2	1.5	4.8
3	1.3	10.8
4	3.8	5.0
5	1.5	
6	2.9	
7	8.0	

THOSAMPLE T FOR C11 VS C12				
	N	MEAN	STDEV	SE MEAN
C11	7	3.00	2.38	0.90
C12	4	5.40	4.04	2.0

95 PCT CI FOR MU C11 - MU C12: (-8.55, 3.7)

TTEST MU C11 = MU C12 (VS GT): T=-1.08 P=0.83 DF=4.2

Mann-Whitney Confidence Interval and Test

C11	N = 7	MEDIAN =	2.0000
C12	N = 4	MEDIAN =	4.9000
POINT ESTIMATE FOR ETA1-ETA2 IS			-2.8014
95.3 PCT C.I. FOR ETA1-ETA2 IS (		-8.8,	2.8)
W = 37.0			

TEST OF ETA1 = ETA2 VS. ETA1 G.T. ETA2 CANNOT REJECT SINCE W IS L.T.

42.0

7. In Fiscal Year 1988, was the percentage of dollars sub-contracted with SDB's greater at SUPSHIP's that evaluated ACO's without significant collateral duties in this area than at SUPSHIP's that did not evaluate these ACO's?

Null Hypothesis: The mean percentage of subcontracts at SUPSHIP's evaluating these ACO's was equal to or less than the mean percentage of subcontracts at SUPSHIP's not evaluating these ACO's.

#### Statistical Analysis:

ROW	C13	C14
	YES	NO
1	2.0	1.5
2	1.3	1.0
3	2.9	4.8
4		10.8
5		3.8
6		1.5
7		4.8
8		8.0

THOSAMPLE T FOR C13 VS C14				
	N	MEAN	STDEV	SE MEAN
C13	3	2.067	0.802	0.46
C14	8	4.52	3.44	1.2

95 PCT CI FOR MU C13 - MU C14: (-5.46, 0.5)  
TTEST MU C13 = MU C14 (VS GT): T=-1.89 P=0.95 DF=8.5

#### Mann-Whitney Confidence Interval and Test

C13	N =	3	MEDIAN =	2.0000
C14	N =	8	MEDIAN =	4.3000
POINT ESTIMATE FOR ETA1-ETA2 IS			-1.9002	
95.8 PCT C.I. FOR ETA1-ETA2 IS (			-8.8,	1.4)
N =			13.0	

TEST OF ETA1 = ETA2 VS. ETA1 G.T. ETA2 CANNOT REJECT SINCE W IS L.T.

18.0

8. Was the change from Fiscal Year 1987 to Fiscal Year 1988 in the percentage of dollars subcontracted with SDB's greater at NAVPRO's that evaluated ACO's with significant collateral duties in this area than at NAVPRO's that did not evaluate these ACO's?

Null Hypothesis: The mean change in the percentage of subcontracts at NAVPRO's evaluating these ACO's was equal to or less than the mean change in the percentage of subcontracts at NAVPRO's not evaluating these ACO's.

Statistical Analysis:

ROW	C15	C16
	YES	NO
1	1.8	-1.00
2	-0.1	0.28
3	0.2	0.00
4	0.5	0.50
5	0.4	0.00
6	0.5	
7	0.9	
8	0.0	

THOSAMPLE T FOR C15 VS C16

	N	MEAN	STDEV	SE MEAN
C15	8	0.525	0.604	0.21
C16	5	-0.044	0.574	0.26

95 PCT CI FOR MU C15 - MU C16: (-0.20, 1.34)

TTEST MU C15 = MU C16 (VS GT): T=1.70 P=0.063 DF=9.0

Mann-Whitney Confidence Interval and Test

C15	N = 8	MEDIAN =	0.45000
C16	N = 5	MEDIAN =	0.00000
POINT ESTIMATE FOR ETA1-ETA2 IS			0.4000
95.2 PCT C.I. FOR ETA1-ETA2 IS (		-0.10,	1.50)
W = 65.0			
TEST OF ETA1 = ETA2 VS. ETA1 G.T. ETA2 IS SIGNIFICANT AT 0.1067			
CANNOT REJECT AT ALPHA = 0.05			

9. Was the change from Fiscal Year 1987 to Fiscal Year 1988 in the percentage of dollars subcontracted with SDB's greater at NAVPRO's that evaluated ACO's without significant collateral duties in this area than at NAVPRO's that did not evaluate these ACO's?

Null Hypothesis: The mean change in the percentage of subcontracts at NAVPRO's evaluating these ACO's was equal to or less than the mean change in the percentage of subcontracts at NAVPRO's not evaluating these ACO's.

Statistical Analysis:

ROW	C17	C18
	YES	NO
1	1.8	-1.00
2	0.2	-0.10
3		0.28
4		0.50
5		0.40
6		0.00
7		5.00
8		0.70
9		0.50
10		0.00
11		0.00

THOSAMPLE T FOR C17 VS C18

	N	MEAN	STDEV	SE MEAN
C17	2	1.00	1.13	0.80
C18	11	0.57	1.54	0.46

95 PCT CI FOR MU C17 - MU C18: (-11.32, 12.18)

TTEST MU C17 = MU C18 (VS GT): T=0.46 P=0.36 DF=1.8

Mann-Whitney Confidence Interval and Test

C17	N = 2	MEDIAN =	1.0000
C18	N = 11	MEDIAN =	0.2800
POINT ESTIMATE FOR ETA1-ETA2 IS			0.6994
95.2 PCT C.I. FOR ETA1-ETA2 IS (		-4.80,	2.81)
N = 18.0			

TEST OF ETA1 = ETA2 VS. ETA1 G.T. ETA2 IS SIGNIFICANT AT 0.2448

CANNOT REJECT AT ALPHA = 0.05

10. Was the change from Fiscal Year 1987 to Fiscal Year 1988 in the percentage of dollars subcontracted with SDB's greater at SUPSHIP's that evaluated ACO's with significant collateral duties in this area than at SUPSHIP's that did not evaluate these ACO's?

Null Hypothesis: The mean change in the percentage of subcontracts at SUPSHIP's evaluating these ACO's was equal to or less than the mean change in the percentage of subcontracts at NAVPRO's not evaluating these ACO's.

#### Statistical Analysis:

ROW	C19 YES	C20 NO
1	0.20	-0.2
2	-0.70	1.8
3	0.00	
4	0.40	
5	0.10	
6	2.13	

TWO-SAMPLE T FOR C19 VS C20				
	N	MEAN	STDEV	SE MEAN
C19	6	0.355	0.947	0.39
C20	2	0.80	1.41	1.0

95 PCT CI FOR MU C19 - MU C20: (-14.07, 13.2)

TTEST MU C19 = MU C20 (VS GT): T=-0.42 P=0.63 DF=1.3

#### Mann-Whitney Confidence Interval and Test

C19	N = 6	MEDIAN =	0.15000
C20	N = 2	MEDIAN =	0.80000
POINT ESTIMATE FOR ETA1-ETA2 IS			-0.1509
93.3 PCT C.I. FOR ETA1-ETA2 IS (		-2.50,	2.32)
N = 27.0			
TEST OF ETA1 = ETA2 VS. ETA1 G.T. ETA2 IS SIGNIFICANT AT 0.5000			
CANNOT REJECT AT ALPHA = 0.05			

11. Was the change from Fiscal Year 1987 to Fiscal Year 1988 in the percentage of dollars subcontracted with SDB's greater at SUPSHIP's that evaluated ACO's without significant collateral duties in this area than at SUPSHIP's that did not evaluate these ACO's?

Null Hypothesis: The mean change in the percentage of subcontracts at SUPSHIP's evaluating these ACO's was equal to or less than the mean change in the percentage of subcontracts at SUPSHIP's not evaluating these ACO's.

#### Statistical Analysis:

ROW	C21 YES	C22 NO
1	0.20	-0.7
2	0.00	-0.2
3	2.13	1.8
4		0.4
5		0.1
6		0.3

THOSAMPLE T FOR C21 VS C22				
	N	MEAN	STDEV	SE MEAN
C21	3	0.78	1.18	0.68
C22	6	0.283	0.842	0.34

95 PCT CI FOR MU C21 - MU C22: (-1.93, 2.92)  
TTEST MU C21 = MU C22 (VS GT): T=0.65 P=0.28 DF=3.1

#### Mann-Whitney Confidence Interval and Test

C21 N = 3 MEDIAN = 0.20000  
C22 N = 6 MEDIAN = 0.20000  
POINT ESTIMATE FOR ETA1-ETA2 IS 0.2649  
97.2 PCT C.I. FOR ETA1-ETA2 IS (-1.81, 2.84)  
W = 17.0  
TEST OF ETA1 = ETA2 VS. ETA1 G.T. ETA2 IS SIGNIFICANT AT 0.3493  
CANNOT REJECT AT ALPHA = 0.05



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